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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
PETITIONERS,

v.

DAVID M. BARRY, M.D., *et al.*,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS

The respondents respectfully request this Court to affirm the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 16, 1977.

Opinions Below, Jurisdiction, Statutes Involved

The respondents concur in the statements under these headings in petitioners' brief.

Question Presented

Section 2(b) of the McCarran-Ferguson Act (hereinafter sometimes referred to as "the Act"), 15 U.S.C. §1012(b) (1970), provides, *inter alia,* that the Sherman Act, 15 U.S.C. §§1-7 (1970, *as amended,* Supp. V, 1975), is "applicable to the business of insurance [*only*] to the extent that such business is not regulated by State Law." However, §3(b) of the Act, 15 U.S.C. §1013(b) (1970) (hereinafter sometimes referred to as "the boycott exception"), provides that "[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The question presented in this case is whether the protection provided by §3(b) is to be narrowly limited to competitors within the insurance industry or whether it extends to all victims of the proscribed practices, including policyholders.

Statement of the Case

The complaint alleges as follows: in April 1975, petitioners St. Paul, Aetna, Travelers and Hartford wrote all the medical malpractice insurance in the State of Rhode Island. (A. 20.) St. Paul was the largest carrier of medical malpractice insurance in the state, and most of its policies were written to expire on the same date. (A. 22.) Shortly before that date, in April 1975, St. Paul notified its insureds that it would not renew its policies on an occurrence basis but only on a claims made basis, which provides substantially reduced coverage. (A. 23-24.) When St. Paul's policyholders tried to take their business elsewhere, they found that the other insurers would not sell them any medical malpractice insurance on any terms. (A. 24-25.) This concerted refusal of three of petitioners to deal with

respondent physicians amounts to a boycott. (A. 25, 27.) In addition, petitioners are alleged to have engaged in a purposeful course of coercion and intimidation with respect to the sale of medical malpractice insurance. (A. 25, 27.)

Whether these allegations state a claim upon which relief can be granted depends upon whether §3(b), which prohibits boycott, coercion and intimidation, applies to policyholders. In resolving that issue, the First Circuit acknowledged the existence of several cases holding that, notwithstanding the apparent broad scope of the boycott exception, Congress intended that exception to apply only to insurance company boycotts of other insurance companies or agents. The court declined to follow those cases. It pointed out that the first of them, *Transnational Insurance Co.* v. *Rosenlund,* 261 F. Supp. 12 (D. Ore. 1966), "though referring broadly to 'the legislative history,' cited only a single page of the Congressional record in support of this reading." 555 F.2d at 7 (A. 56). It then noted that subsequent cases have simply adopted *Transnational's* interpretation of the legislative history, without any independent analysis of the issue, on the ground that any other reading of the boycott exception would "vitiate" or "emasculate" the McCarran-Ferguson antitrust exemption. *Id.* (A. 56-57.)[1]

The First Circuit based its rejection of prior authority on three grounds. First, the language of the statute is plain and unambiguous, and there is no need to resort to the legislative history to determine its scope. In support of this ground, the court stated that the words of the boycott exception,

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[1] *Transnational* and the other lower court cases relied upon by petitioners, as well as lower court precedents that support the opinion of the First Circuit, are fully discussed in respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 7-15. That discussion will not be repeated in this brief.

> "within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a 'concerted refusal to deal' wih a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Concerted refusal by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed, appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language." 555 F.2d at 7-8 (A. 57-58) (footnote omitted).

Second, the First Circuit effectively refuted the unsupported assertions of some courts — repeated by petitioners and *amici* herein — to the effect that a narrow construction of the boycott provision is necessary to prevent "vitiation" or "emasculation" of the antitrust exemption. The court pointed out that, if the boycott exception were given its natural scope instead of an artificially narrow reading, McCarran-Ferguson would still (1) ensure the validity of state taxation and regulation of the business of insurance, and (2) insulate insurance companies both from antitrust liability for acts not amounting to boycott, coercion, or intimidation and from many other federal regulatory statutes. *Id.* at 8 (A. 58-59). The court also suggested that *Parker* v. *Brown*, 317 U.S. 341 (1943), would protect necessary state regulatory measures, noting that *Parker* "may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act." *Id.* at 8-9 (A. 60.) But, said the court,

> *"there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanc-*

> *tions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies.* Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." *Id.* at 9 (A. 60) (emphasis added).

Finally, notwithstanding its belief that reference to the legislative history was unwarranted, the court entered into a detailed consideration of that history "in deference to the courts which have found support in [it]." *Id.* at 9 (A. 62). After an extensive discussion, including quotations of the congressional remarks relied upon most heavily by petitioners, the court concluded that the legislative debates and reports not only contain no evidence of a congressional intent to limit the boycott exception to acts or agreements directed against other insurance companies or agents, but actually support the view that the exception includes any boycott that is illegal under the Sherman Act:

> "[T]he boycott provision [was] the all purpose safety valve. It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concern of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel. *See* Levi, *An*

Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 522 (1948). . . . While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed, Senator O'Mahoney referred to the Insurance Executives Association rules as 'the sort of agreement' to be condemned. *His summary answer to Senator Barkley that 'every effective combination or agreement to carry out a program against the public interest' would be prohibited by the boycott section could not be more unrestricted." Id.* at 11-12 (A. 67-68) (emphasis added).

Summary of Argument

The statutory language is clear and unambiguous and does not require interpretation. Section 3(b) expressly applies the Sherman Act to "any" act or agreement of boycott, coercion, or intimidation. Since a concerted refusal to deal with consumers is a boycott, respondents have alleged a boycott within the meaning of §3(b). Petitioners' argument that consumers cannot be boycotted is inconsistent with case law and with the well-established consumer protection function of the Sherman Act. Furthermore, respondents' allegations of coercion and intimidation, which petitioners have never challenged, are alone sufficient to require denial of petitioners' motion to dismiss.

The legislative history of the McCarran-Ferguson Act supports the view that §3(b) includes all acts of boycott, coercion, or intimidation that are illegal under the Sherman Act. The congressional debates show that the purpose of the Act was to uphold the validity of state taxation and regulation of insurance, not to immunize insurance companies from antitrust liability for private anticompetitive

agreements not authorized by the states. The purpose of §3(b) was to deprive insurance companies of the enforcement mechanisms needed to carry out private anticompetitive conspiracies. The debates do not support the view that the protection of §3(b) is limited to a particular class of victims.

Moreover, this Court has consistently given a narrow construction to the exemption from federal regulation contained in §2(b) of the Act, thus giving correspondingly broad scope to federal concerns. A narrow reading of §3(b) would be inconsistent with these decisions.

The First Circuit's interpretation of §3(b) will not interfere with state regulation and taxation of insurance, nor will it subject insurance companies to antitrust liability for legitimate, state-authorized concerted activities. It is consistent with the nation's antitrust policies and with the overall purpose of the McCarran-Ferguson Act. The petitioners have not shown any reason why they should be given an implied exemption from liability under §3(b). Accordingly, the decision of the First Circuit should be affirmed.

Argument

I. The First Circuit Correctly Interpreted Section 3(b) in Accordance With Its Plain Meaning.

The issue in this case is whether the concerted refusal of three insurance companies to sell medical malpractice insurance to a group of physicians constitutes a "boycott" within the meaning of the boycott exception. The question is thus one of statutory construction, and the starting point in every case involving the construction of a statute is in the plain meaning of the statutory language itself. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421

U.S. 723, 756 (1975) (Powell, J., concurring); *Flora* v. *United States*, 357 U.S. 63, 65 (1958); *United States* v. *Great Northern R.R.*, 343 U.S. 562, 575 (1952). The respondents submit that the plain meaning of the term "boycott" encompasses the conduct alleged here and that the statutory language contains no hint of the artificial limitations that petitioners seek to impose.

A. *Consumers can be the victims of a boycott.*

Although they did not brief or argue this issue in the court below, *see* 555 F.2d at 7-8 (A. 57-58),[2] petitioners now ask this Court to hold that a concerted refusal to deal with consumers is not a boycott. (Pet. Br. at 21-24.) No such statement is to be found, however, in any of the cases cited by petitioners in support of their argument. This Court has never stated, nor even suggested, that consumers cannot be the victims of a boycott.

In fact, the term "boycott" is commonly understood to include any concerted refusal to deal. *See, e.g., Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12, 28 (D. Ore. 1966); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 181 (E.D. Tenn. 1940), *aff'd mem.*, 123 F.2d 1016 (6th Cir. 1941). A boycott is not merely one type of concerted refusal to deal; rather, the terms are synonymous. Bird, *Sherman Act Limitations on Noncommercial Refusals to Deal*, 1970 Duke L.J. 247, 248 n.2. As one author puts it:

> "The legality . . . of a form of group economic action called a 'boycott' or, less invidiously, a 'concerted refusal to deal' has frequently been tested in the courts.

[2] See also respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 20-21.

> *In its simplest aspects, a boycott or concerted refusal to deal is nothing more than an agreement among a number of economic actors to sever or limit economic relations with another economic actor or actors." Id.* at 248 (footnotes omitted) (emphasis added).

Thus, the term "boycott" is actually "a very broad label for divergent types of concerted activity," *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 458 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) — including concerted refusals to deal with consumers.[3]

The Ninth Circuit has squarely held that the concerted refusal of manufacturers or dealers to deal with consumers is a boycott under the antitrust laws. *Washington State Bowling Proprietors Association* v. *Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). Furthermore, this Court has clearly indicated that consumers can be boycotted. In *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944) — the case from which Congress drew the "boycott, coercion, or intimidation" language of McCarran-Ferguson — the Court described the charges set forth in the indictment as follows:

[3] "Some commentators would artificially restrict the meaning of 'boycott', apparently fearing an overbroad application of the rule that boycotts are illegal *per se*. *See* L. Sullivan, *Antitrust* §§ 83, 90 (1977). This fear may be allayed more directly by recognizing that, while some boycotts are irredeemably anti-competitive and thus fit subjects for a *per se* rule, others are benign and not properly treated as illegal *per se*. *See* P. Areeda, *Antitrust Analysis* 287 (1967); *see also Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969) (boycott not illegal *per se* when participants had no anti-competitive motive). Certainly nothing in this opinion requires the application of a *per se* rule to all acts falling within the ordinary meaning of the word 'boycott.' " 555 F.2d at 8 n.4 (A. 58 n.4).
This issue is discussed in greater detail in Point V, *infra*.

> "The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, *and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms* . . . . [P]*ersons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage.*" *Id.* at 535-36 (emphasis added).

Moreover, the concluding paragraph of the opinion referred to "combinations of insurance companies to coerce, intimidate, and boycott competitors *and consumers.*" *Id.* at 562 (emphasis added). Thus, the *South-Eastern Underwriters* Court was clearly of the opinion that consumers in general, and consumers of insurance in particular, could be the victims of a boycott.[4]

[4] *See also FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 250 (1968) (concerted refusal to deal with steamship passengers; Court branded as illegal "any agreement by a group of competitors to boycott a particular buyer or group of buyers"); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (per curiam) (defendants' alleged agreement not to sell gas to consumers for use in gas heaters manufactured by plaintiff would, if proved, constitute a *per se* violation of the Sherman Act); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948) ("[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers").

If, as the First Circuit suggested, 555 F.2d at 7-8 n.4 (A. 57-58 n.4), boycotts of consumers are less common than boycotts of businessmen, that is obviously because a successful boycott requires a captive market—that is, the victims of the boycott must be in a position where they have no choice but to do business with the boycotters and therefore must submit to the conspirators' demands. Otherwise, the victims will simply take their business elsewhere, and the boycott will fail. Thus, where the consuming public is large and its market choices numerous, it cannot be trapped by a boycott. In this case, however, respondents allege that petitioners have complete control over the medical malpractice insurance market in Rhode Island. (A. 20.)

Furthermore, the purpose of the boycott of consumers in *South-Eastern Underwriters* — "to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms," *id.* at 535 — is precisely analogous to the purpose of the boycott alleged in this case—to compel physicians then insured by petitioner St. Paul to continue to buy malpractice insurance only from St. Paul, and on St. Paul's terms. Physicians cannot practice without malpractice insurance; and if only one insurer will sell it to them, then they must perforce buy from that one at whatever terms the seller chooses to dictate. Thus, the boycotts of policyholders in *South-Eastern Underwriters* and in this case both fall into the category of boycotts "directed at controlling the terms and manner of distribution of the subject article." *United States* v. *General Electric Co.,* 80 F. Supp. 989, 1009 (S.D.N.Y. 1948).

The petitioners, however, argue that a concerted refusal to deal is not a boycott unless it has as its purpose the elimination of a competitor from the market or the control of the victim's trading practices. (Pet. Br. at 21, 23.) No other purpose will suffice to make a boycott, according to petitioners. In fact, boycotts have many purposes. The objective of a conspiracy is irrelevant to whether that conspiracy is a boycott. *See* Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws,* 71 Harv. L. Rev. 1531, 1531-32 (1958); *cf. Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457, 467-68 (1941). For example, in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211 (1951), the defendant distillers, in an unusual twist on resale price maintenance, conspired to refuse to sell to wholesalers who would not agree to *maximum* resale prices set by the defendants. The Court held, *id.* at 214, that "the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers" — regardless of the reason. *See also United*

States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 295 (1945) (conspiracy to raise, fix and stabilize retail liquor prices enforced by a two-way vertical boycott).

The petitioners also contend that this is not a boycott because it is "[n]othing more . . . than a conspiracy among insurance companies to voluntarily limit competition among themselves." (Pet. Br. at 23-24.) The emphasis on voluntariness is puzzling; every boycott is a voluntary agreement among the conspirators. Voluntary anticompetitive agreements are not immune from antitrust liability; indeed, "[i]t is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." *UMW* v. *Pennington*, 381 U.S. 657, 668 (1965).

More fundamentally, however, this argument again relies upon the erroneous notion that the purpose of a boycott is part of its definition. A boycott is an enforcement mechanism for carrying out an anticompetitive decision, not an end in itself. *See United States* v. *Frankfort Distilleries, Inc., supra*, 324 U.S. at 295; *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262, 274 (D.C. Cir.), *petition for cert. filed*, No. 77-580, 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977); Pet. Br. at 25. No matter what kind of anticompetitive agreement a boycott is used to enforce, it is still a boycott. In any event, there is nothing novel about the use of a boycott to enforce a horizontal agreement not to compete. *See Johnson* v. *Joseph Schlitz Brewing Co., supra.*

The artificiality of petitioners' attempt to divide victims of concerted refusals to deal into "traders" and "consumers" is shown by the fact that the victims in the *Kiefer-Stewart* and *Frankfort Distilleries* cases, both *supra*, though traders, were also customers; and respondent physicians in this case, though customers, purchase malpractice insurance for commercial purposes. There is no sharp con-

ceptual difference between the liquor wholesalers and retailers in *Kiefer-Stewart* and *Frankfort Distilleries*, who had to purchase the defendants' product in order to carry on their business, and respondent physicians here, who must purchase petitioners' product in order to carry on their business. The anticompetitive effect of the boycott is directed against "traders" in both cases.

Even if respondent physicians are considered simply as ultimate consumers (like purchasers of homeowners' insurance), however, petitioners' notion that concerted refusal to deal with consumers is not a boycott flies in the face of the whole policy of the antitrust laws. As the First Circuit noted,

> "the features that make boycotts objectionable do not disappear when consumers are boycotted. Like boycotts aimed at retailers, concerted refusals to deal with consumers may restrain traders' 'ability to sell in accordance with their own judgment'; they can deprive consumers of the 'freedom to buy . . . in an open competitive market'; and they 'interfere with the natural flow of interstate commerce.' *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, [359 U.S. 207, 212-13 (1959)]." 555 F.2d at 8 n.4 (A. 58 n.4).

This Court has recently held that a foreign government is a "person" within the meaning of § 4 of the Clayton Act. *Pfizer, Inc.* v. *Government of India*, 46 U.S.L.W. 4073 (U.S. Jan. 11, 1978). The Court noted the broad scope of the antitrust laws, stating that " '[t]he Act is comprehensive in its terms and coverage, *protecting all who are made victims of the forbidden practices* by whomever they may be perpetrated.' " *Id.* at 4074, *quoting Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (emphasis added). In light of the historic sweep of the antitrust laws, it would be extraordinary if the antitrust term "boycott" were to be held to be a narrow,

technical, exclusionary term. Under petitioners' interpretation, consumers who are victimized by concerted refusals to deal would be left remediless under the Sherman Act, merely because they are consumers; and this would be so not only in cases involving insurance, but in all cases. Such a result is inconsistent with the history and purpose of the Sherman Act. *See Pfizer, Inc.* v. *Government of India*, *supra*, 46 U.S.L.W. at 4076.

In fact, consumer protection is one of the historic functions of the Sherman Act. The Court in the *Pfizer* case unanimously agreed that the purposes of the antitrust laws is to protect American consumers. *See* 46 U.S.L.W. at 4074-75 (opinion of the Court); *id.* at 4076 (Burger, C.J., dissenting). The protection of businessmen from conspiracies in restraint of trade is not, or is not solely, an end in itself; its purpose is to protect the general public from the evils that flow from monopoly and to secure to it the benefits of competition. *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, 42-43 (1930); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773, 790 (1974). Free competition benefits the consumer as well as the seller. As the Court said in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940):

> "The end sought [by the passage of the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market *to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of *public* injury." *Id.* at 493 (emphasis added) (footnote omitted).

The ultimate victim of a boycott is always the consumer. Yet petitioners propose that the Sherman Act be interpreted so that businesses can accomplish directly, through

boycotts of consumers, what they are not permitted to accomplish indirectly through boycotts of other traders. Their proposal has the anomalous result of permitting the direct harmful act against the consumer while prohibiting the act that indirectly results in harm to the consumer. The consumer is a chief beneficiary of the Sherman Act; it would be absurd to strip him of that protection when the coercive activity is directed at him.

In view of the broad consensus that the term "boycott" encompasses a wide range of activities, the clear indication in *South-Eastern Underwriters* and other cases that concerted refusal to deal with consumers is a boycott, and the historic purpose of the Sherman Act to secure the benefits of free competition to consumers, this Court should reject petitioners' narrow, technical definition. The respondents submit that the plain meaning of the term "boycott" is simply a concerted refusal to deal—with any person and for any purpose. That includes the conduct alleged here.

B. *Even without the boycott allegation, respondents are afforded the protection of section 3(b) against coercion or intimidation.*

The petitioners' argument ignores the fact that the complaint alleges acts of coercion and intimidation as well as boycott. (A. 25, 27). The petitioners have never challenged the sufficiency of those allegations. Nor do they claim that "coercion" and "intimidation" are terms of art that can only be used to describe acts perpetrated against businessmen. There is no question but that consumers can be the victims of coercion and intimidation.[5]

[5] The obviously broad and nontechnical meaning of the words "coercion" and "intimidation" supports the view that the term "boycott" is also used in its ordinary sense as any concerted refusal to deal. Congress clearly did not have a narrow category of conduct in mind when it enacted § 3(b).

Section 3(b) is written in the disjunctive. It is not necessary to allege boycott, coercion *and* intimidation; the allegation of any one of those acts is sufficient to bring the case within the exception Moreover, the legislative history of the McCarran-Ferguson Act makes it quite clear that "coercion" and "intimidation" have meaning independent from "boycott." In discussing the scope of § 3(b), Senator Ferguson, co-author and Senate floor manager of the bill, stated:

> "[I]f agreements in restraint of trade or to monopolize amounted either to a boycott *and/or* coercion *and/or intimidation,* they would be absolutely void . . . ." 91 Cong. Rec. 480 (1945) (emphasis added).

In addition, he pointed out (*id.* at 1481):

> "[T]here are *six* things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce or intimidate." (emphasis added).

The allegations of coercion and intimidation are not redundant; they refer to acts other than the boycott itself. *See United States* v. *South-Eastern Underwriters Association, supra,* 322 U.S. at 535 (distinguishing between boycotts and other types of coercion and intimidation). The sufficiency of these allegations to state a claim under § 3(b) stands unchallenged. The respondents are clearly entitled to protection against the alleged acts. Accordingly, the First Circuit's denial of petitioners' motion to dismiss should be affirmed, regardless of the definition of "boycott."

C. *The statutory language expressly includes all agreements and acts of boycott, coercion, or intimidation.*

Section 3(b) provides that the Sherman Act shall remain applicable to "*any* agreement to boycott, coerce,

or intimidate, or act of boycott, coercion, or intimidation." (emphasis added.) There is not the slightest suggestion of any limitation upon the scope of these words. By the express terms of the Act, all agreements and acts of boycott, coercion, or intimidation are covered.

These words are clear and unambiguous and require no interpretation. 555 F.2d at 7-8 (A. 57-58). The statute plainly prohibits *all* agreements and acts of boycott, coercion, or intimidation—including agreements and acts directed against policyholders. Thus, as the First Circuit said, "the artificial reading of the boycott provision that [respondents] urge . . . can only be characterized as a judge-made expansion of the Act." 555 F.2d at 9 (A. 61). There is no justification for going behind the statutory language to obtain this strained construction.

In short, there is no reason to reject the literal interpretation of the statutory words, unless that interpretation would lead to absurd results or would thwart the obvious purpose of the Act. *Helvering* v. *Hammell,* 311 U.S. 504, 510-11 (1941). The petitioners, of course, argue that such is the case here. As we show in Point II, however, the only proper reading of § 3(b), consistent with the overall purpose of the Act, is that of the First Circuit.

II. The First Circuit's Interpretation of Section 3(b) Is Fully Consistent With, and in Fact Supports and Carries Out, the Purpose of the McCarran-Ferguson Act.

A. *The purpose of the Act was to protect state taxing and regulatory programs, not to immunize insurance companies from antitrust liability.*

In *United States* v. *South-Eastern Underwriters Association, supra,* this Court held for the first time that the business of insurance is interstate commerce and therefore is

subject to federal regulation. While the *South-Eastern* case was pending in this Court, legislation was introduced in Congress that would have exempted the business of insurance from all federal regulation, including the antitrust laws. That legislation was defeated. 91 Cong. Rec. 1477, col. 3 (1945) (remarks of Senator Pepper); *id.* at 1487, col. 3 (remarks of Senator Barkley); Note, *Applications of Federal Antitrust Laws to the Insurance Industry*, 46 Minn. L. Rev. 1088, 1090 n.11 (1962) (hereinafter cited as "Minnesota Note"). When Congress passed the McCarran-Ferguson Act the following year, it did not grant the insurance industry a blanket exemption from the Sherman Act; rather, it provided that, even where the business of insurance is fully regulated by the states, the Sherman Act remains applicable to "any" agreement or act of boycott, coercion, or intimidation.

The petitioners assume the very point at issue when they assert that "[t]here is no question" that the purpose of the McCarran-Ferguson Act was "to render the Sherman Act inapplicable to the business of insurance *except in limited circumstances.*" (Pet. Br. at 14 [emphasis added].) We agree with petitioners that the terms "boycott, coercion, or intimidation" do not encompass every conceivable violation of the Sherman Act. *See* 555 F.2d at 8 (A. 59). But whether, within that limitation, § 3(b) is to be given its natural scope or an artificially narrow construction is precisely what the Court must decide in this case. It is a question of determining the balance between the § 2(b) antitrust exemption on the one hand and the boycott exception on the other.

This Court has held that the purpose of McCarran-Ferguson "was to allay doubts, thought to have been raised by this Court's decision [in *South-Eastern Underwriters*], as to the continuing power of the States to tax and regulate the business of insurance." *FTC* v. *Travelers Health Association*, 362 U.S. 293, 299 (1960) (footnote omitted). Its

primary purpose, in other words, was "to *permit* the continued exercise of state power rather than to *prevent* the exercise of federal power." Minnesota Note, 46 Minn. L. Rev. at 1092-93 (footnote omitted).

The kind of state regulation that Congress particularly wished to uphold was regulation that authorized or permitted the fixing of rates and terms through the use of rating bureaus or other joint mechanisms. Such activity would obviously be violative of the Sherman Act in the absence of the McCarran-Ferguson Act. Just as obviously, such activity has nothing to do with boycott, coercion, or intimidation, which are still forbidden under McCarran-Ferguson.

The language of McCarran-Ferguson clearly speaks in terms of protecting state regulatory programs, not insurance companies. Section 1 declares that continued state regulation and taxation of insurance is in the public interest and that congressional silence shall not be construed to prevent such regulation and taxation. Section 2(a) provides that the business of insurance shall be subject to state taxing and regulatory programs. The first clause of § 2(b) provides that only federal statutes that specifically relate to insurance shall supersede state insurance regulations.

In furtherance of this purpose of validating state regulatory programs without relinquishing paramount federal control, § 2(b) goes on to provide that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." And to assure federal control over an important range of anticompetitive activities, § 3(b) provides that the Sherman Act remains applicable to all agreements or acts of boycott, coercion, or intimidation.

Under the statutory scheme, only two kinds of federal laws apply to the business of insurance *notwithstanding state regulation:* (1) laws expressly relating to insurance;

and (2) the Sherman Act, to the extent that it prohibits boycott, coercion and intimidation. Thus, the Sherman Act's prohibition of such acts and agreements is placed on the same high plane as federal legislation expressly addressed to the business of insurance. In determining the scope of § 3(b), its importance in the statutory scheme must be kept in mind.

The obvious purpose of § 3(b) was to ensure that the core safeguards of the Sherman Act would be maintained. Congress clearly felt that the states could not effectively control insurance company conspiracies involving boycott, coercion, or intimidation and that the public interest required federal protection against such practices under the Sherman Act. Note, *The Limits of State Regulation Under the McCarran-Ferguson Act,* 42 Geo. Wash. L. Rev. 427, 445 (1974); Minnesota Note, 46 Minn. L. Rev. at 1103-04.

Thus, the respective purposes of the McCarran-Ferguson antitrust exemption, on the one hand, and the boycott exception, on the other, do not support the artificially narrow reading of the latter proposed by petitioners.

The foregoing argument is supported by the legislative history of the Act, to which we now turn. Three threads run consistently through the congressional debate: First, the primary purpose of the legislation was to ensure the validity of state taxation of the business of insurance, which was thought to be in immediate jeopardy because of the *South-Eastern Underwriters* decision. Second, Congress only proposed to permit price-fixing and other activities that would otherwise violate the antitrust laws to the extent that such activities were authorized by the states; it gave no sanction to private anticompetitive agreements, and it sought by means of § 3(b) to rob such agreements of their effectiveness. Third, the terms "boycott, coercion, or intimidation" have their full Sherman Act scope—that is, that they include all acts or agreements of boycott, coercion or intimidation, against whomever such acts or agreements may be directed.

B. *The legislative history of the boycott exception shows that it was intended to apply to all boycotts.*[6]

The bill that ultimately became the McCarran-Ferguson Act was reported out of committee to the Senate on January 24, 1945 and to the House on February 13, 1945. Both committee reports cited the boycott provision. The Senate report noted that "at no time are the prohibitions of the Sherman Act against *any* agreement or act of boycott, coercion, or intimidation, suspended. These provisions of the Sherman Act remain in full force and effect." S. Rep. No. 20, 79th Cong., 1st Sess. (1945) (emphasis added). The House report was the same except for the exclusion of the words "agreement or," since the "agreement" language had been deleted from the bill by the House committee. H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945).

The bill was debated in the Senate on January 25. At the outset, Senator Ferguson, co-author and Senate floor manager of the bill, sounded a main theme of the debate —that speedy action was necessary so that the states could collect insurance company taxes then coming due:

> "Mr. President, in order to show the importance of this matter to the States, let me say that this morning I received word that Commissioner Charles F. J. Harrington, of Massachusetts, who is chairman of the committee on Federal legislation of the insurance commissioners body, was advised by William P. J. Hodges, insurance commissioner for the State of North Carolina, that some insurance companies had given notice to their States that they would not pay the tax which is being levied in those States, or that they would pay

[6] The complete 1945 legislative history of the McCarran-Ferguson Act, including all the congressional debates, is reproduced in the Addendum to Brief for Appellees St. Paul Fire & Marine Insurance Co. and Travelers Insurance Co., filed in the First Circuit.

it under protest. Under the law, it would be necessary to suspend the licenses of such companies and of all their agents. The insurance tax would have to be paid by February 15. In South Carolina, Kentucky, and Tennessee the tax is due on February 1.

"So it is advisable that the bill be passed quickly, if it is possible to do so." 91 Cong. Rec. 478-79 (1945).

Accord, id. at 483, col. 1 (remarks of Senator Radcliffe); *id.* at 484, col. 1 (remarks of Senator Ferguson); *id.* at 485, col. 3 (remarks of Senator Revercomb); *id.* at 487, col. 1 (remarks of Senator Ellender).

Senator Ferguson also made two important comments on § 3(b), in response to Senator O'Mahoney's concern that the bill would permit the states to authorize insurance company monopolies:

"Mr. O'MAHONEY. . . . Does the Senator from Michigan [Ferguson] conceive that the pending bill as reported by the Judiciary Committee . . . has the effect of making it possible for a State to legalize contracts in restraint of trade or has the effect of making it possible for any State to authorize attempts on the part of any group of insurance companies to monopolize the business of insurance. I did not understand that to be the opinion of the Senator from Michigan.

"Mr. FERGUSON. No. I will answer that by saying that *if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void,* because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today." Id. at 480 (emphasis added).

This exchange shows that if *any* agreement in restraint of trade is carried out by means of boycott, coercion, or intimidation, the conspirators are subject to Sherman Act liability. There is no limitation on either the nature of the agreement or its victims.

Senator O'Mahoney continued to express the fear that the bill would permit the establishment of monopolies in the field of insurance. Senator Ferguson responded as follows:

"[I]t is not the purpose of the bill at all to foster monopoly, or to anticipate that any act will be passed permitting or even encouraging monopoly. *A State law relating to taxation, a law relating to regulation,* for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; *but if the State law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any of those three things, then it would be clearly void* because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration." *Id.* at 480-81 (emphasis added).

This clearly shows that the purpose of the Act was to protect state regulatory programs, not insurance companies. It shows that the particular concern of Congress was the validation of state taxation and of state regulation of the cost and terms of insurance. And it shows that, although specific insurance company activities permitted by the states might be monopolistic, the bill was not intended to permit monopolization as such. Section 3(b) was Congress' tool to prevent monopolization and agreements in restraint of trade—"the all purpose safety valve," as the court below said in this case. 555 F.2d at 11-12 (A. 67). The chief protection against monopolization of the insurance industry

was not to be state regulation; it was to be federal regulation under the Sherman Act, through the boycott exception.

Nowhere in these exchanges did Senator Ferguson, or any other senator, suggest that Congress was only concerned with boycott, coercion, or intimidation against particular targets; nowhere did they suggest that the states had any role with respect to any kind of boycott, coercion, or intimidation. To the contrary, Senator Ferguson expressly stated that such acts or agreements were beyond the power of the states to permit.

The bill was briefly debated in the House on February 9 and 12 and more extensively on February 14. Once again, there were many references to the urgency of passing a bill so that the states could continue to tax the insurance companies. 91 Cong. Rec. 979, col. 2-3 (1945) (remarks of Representative Anderson); *id.* at 1087, col. 1-2 (remarks of Representative Hancock); *id.* at 1090-91 (colloquy between Representatives Gwynne and Crawford).

The chief subject of debate was the fact that the House version of the boycott exception only prohibited *acts* of boycott, coercion, or intimidation, not *agreements*. Representative Celler argued that the word "agreements" was necessary to prevent insurance company blacklists of other insurance companies or agents. *Id.* at 1087, col. 3. Representative Walter, the floor manager of the bill, stated that he would not object to amending the bill in conference to include agreements as well as acts of boycott, coercion, or intimidation. *Id.* at 1088, col. 2-3 (colloquy between Representatives McCormack and Walter).

Since the "agreement" language was added to prevent insurance company blacklists, the preexisting "acts" language obviously must have been directed at conduct other than blacklisting. The prohibition against blacklisting was thus an added prohibition, not the original and exclusive target of §3(b), as petitioners would have this Court hold.

No congressman responded to Representative Celler's argument by saying that, since §3(b) was only intended to deal with blacklists in the first place, no amendment was necessary.

Nevertheless, Representative Celler's speech has been cited by a number of courts in support of the narrow view of the boycott exception urged by petitioners. *E.g., Transnational Insurance Co.* v. *Rosenlund, supra,* 261 F. Supp. at 26-27 & n.1. Mr. Celler has taken emphatic issue with this use of his remarks, however, in a letter inserted in the Congressional Record by Representative Corman:[7]

> "By no stretch of the imagination can my remarks be construed as intended to limit the applicability of the Sherman Act to antitrust acts among insurance companies and agents. . . . To the contrary, I think it crystal clear, both from my own remarks and from the legislative history of the McCarran-Ferguson Act, that §1013(b) was intended to render the Sherman Act applicable to (i) *all* agreements to boycott, coerce or intimidate and (ii) to *all* acts of boycott, coercion or intimidation." 120 Cong. Rec. 37351 (1974).

The bill went to conference. An important change was made in conference: the addition of the permanent antitrust exemption contained in §2(b). The original bill had contained only a 3-year moratorium. The House agreed to the conference report without debate. 91 Cong. Rec. 1396 (1945). In the Senate, however, the antitrust exemption sparked an extensive debate.

That debate was held on February 27. The most vocal opponent of the bill in this debate was Senator Pepper. He objected to the provision of §2(b) that would allow the

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[7] The letter is reproduced in full in Appendix B to respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

states to authorize insurance company activities that would otherwise violate the antitrust laws. Senator Ferguson responded to Senator Pepper's concerns by referring to the boycott exception:

> "Under the language which is now in the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions:
>
> "'Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.'
>
> "*In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate.* But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we intended to do. *After a conference with the House, we believed that the States should regulate insurance, and taxation on the insurance business. But we spelled out certain things on which we thought Congress should not allow the States to legislate. Those are the things which I have mentioned.* As to the others, the State has full power to act by legislation — not by agreement but by legislative act." 91 Cong. Rec. 1481 (1945) (emphasis added).

It is important to note Senator Ferguson's repetition of the principle that the states cannot legislate with respect to boycott, coercion, or intimidation. If the alleged acts of petitioners in this case do not amount to boycott, coercion, or intimidation within the meaning of §3(b), then it necessarily follows that the states have the power to authorize such acts. The states, in petitioners' view, could authorize insurance companies to divide up the markets for particular types of insurance and to refuse to deal with each other's customers, so that each insurer's policyholders would be a captive market to which the insurer could dictate terms with respect to all types of insurance. Indeed, under petitioners' interpretation, the states could authorize insurance companies to boycott, coerce and intimidate everyone except other insurance companies and agents. *Cf. Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 51 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (physical violence by insurance company against other traders). It is inconceivable that Congress intended such a result. The whole thrust of the congressional debates is that such predatory practices remain subject to Sherman Act control and beyond the competence of the states.

Senator Ferguson then pointed out that the purpose of the bill was to permit the states to authorize certain concerted activities, such as rate-fixing, but not to permit such activities on a wholly private basis without state authority:

> "This bill would permit — and I think it is fair to say that it is intended to permit — rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. *What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau.*" 91 Cong. Rec. 1481 (1945) (emphasis added).

Thus, petitioners' suggestion that no conspiracy involving price-fixing could fall within §3(b) is clearly wrong. The purpose of the Act was to permit state-authorized rate-fixing, not to give the insurance companies carte blanche to engage in private rate-fixing without state authority. If insurance companies enter into a private rate-fixing agreement, not authorized by state law, and if they enforce that agreement by acts of boycott, coercion, or intimidation against any other business or person — insurance company, agent, other trader, or policyholder — then their conduct comes within the boycott exception, and they are subject to Sherman Act liability. The agreement itself is nothing without the tools to carry it out; and Congress denied the insurance companies those tools when it enacted §3(b).

The foregoing points are summed up in a colloquy between Senators Barkley and O'Mahoney[8] towards the end of the debate:

> Mr. BARKLEY..... Why was the language limited to boycott, coercion, or intimidation, which does not include combinations that do not involve either boycott, coercion, or intimidation?
>
> "Mr. O'MAHONEY: Because the committee was cognizant of the fact that many salutary combinations might be proposed and which ought to be approved, to which there was no objection. *From the very beginning, Mr. President, of this controversy over insurance I have always taken the position that I saw no objection to combinations or agreements among*

[8] Senator O'Mahoney, who had expressed reservations about the bill in the initial Senate debates, was one of the Senate conferees (along with the co-authors) in the House-Senate conference that gave the bill its final form. He strongly supported the bill in the final Senate debate.

> *the companies in the public interest provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*
>
> "Mr. BARKLEY: Let me ask this question: Suppose the regulatory laws of a State permit combinations which might be regarded as violative of the Sherman or Clayton Acts, and over which Congress itself might wish to exercise jurisdiction, are such combinations so sanctioned by the laws of the States to be allowed, even if Congress itself should decide to exercise jurisdiction?
>
> "Mr. O'MAHONEY: No; *my judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the very section [3(b)] the Senator from Kentucky has quoted.*" *Id.* at 1486 (emphasis added).

Once again, the point is emphatically made that the Sherman Act violations permitted to the insurance companies are only those that are authorized and supervised by the states. And once again the broadest possible scope is given to the boycott exception. Senator O'Mahoney says that it would prohibit "*every* effective combination or agreement to carry out a program against the public interest." *Id.* (emphasis added). That statement, as the court below pointed out, "could not be more unrestricted." 555 F.2d at 12 (A. 68). "The public interest" unquestionably includes the interests of consumers. Yet petitioners would have this Court hold, contrary to both the legislative history and common sense, that §3(b) prohibits every action that harms the interests of consumers of insurance *unless* the action is perpetrated directly against them.

The sum and substance of these debates is that Congress felt that certain kinds of concerted activity by insurance companies — specifically, the fixing of the rates and terms of insurance contracts — could be in the public interest if authorized and supervised by the states. But private anti-competitive agreements, unauthorized by the states, were not to be tolerated; and, to ensure that such agreements could not be enforced, Congress provided that the Sherman Act would remain applicable to all acts or agreements of boycott, coercion, or intimidation. The boycott exception also insures that no state can authorize or permit such predatory behavior. The respondents submit that a horizontal agreement among insurers (1) not to compete and (2) to fix the terms of medical malpractice insurance, arrived at in secret without state authority or permission, and enforced by means of a boycott against policyholders and by acts of coercion and intimidation against those policyholders hardy enough to protest, is precisely the kind of predatory behavior, not in the public interest, that Congress sought to protect against by means of the boycott exception. *Cf. Maryland & Virginia Milk Producers Association* v. *United States,* 362 U.S. 458 (1960) (Capper-Volstead Act antitrust exemption does not authorize agricultural cooperatives to engage in predatory activities otherwise violative of the Sherman Act).

The petitioners seek support for their narrow construction of the boycott exception in Senator O'Mahoney's condemnation of the rules of the Insurance Executives Association, which "undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." 91 Cong. Rec. 1486 (1945). But Senator O'Mahoney never said that such intra-industry activities were the only target of the boycott exception. To the contrary, he stated at the outset of his remarks about the Insurance

Executives Association that the boycott exception "outlaws completely *all* steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Id.* at 1485. There is certainly no warrant here for the view that the boycott exception does not protect policyholders. In view of this and numerous other sweeping statements already quoted, it is fallacious to argue that the single example given by Senator O'Mahoney was intended to demonstrate the full scope of the boycott exception. Rather, that example "demonstrates only that such blacklists were *a* concern of the Congress — perhaps even the principal concern — but does not show that they were the *only* concern." *Proctor* v. *State Farm Mutual Automobile Insurance Co., supra,* 561 F.2d at 273; *accord, Barry* v. *St. Paul Fire & Marine Insurance Co.,* 555 F.2d at 12 (A.67). We submit that petitioners' argument perverts the legislative history by presenting a mere example as if it were an all-encompassing definition.

The petitioners concede this point when they admit that no violence is done to the legislative history if the boycott exception is read to include boycotts against other (*i.e.,* non-insurance) traders. (Pet. Br. at 30.) Since no senator or representative ever mentioned such boycotts in the debates, petitioners thus concede that the activities of the Insurance Executives Association cited by Senator O'Mahoney do not describe the full scope of the boycott exception; and drawing the line at "other traders" would be every bit as arbitrary, artificial and unsupported by the legislative history as drawing it at "other insurance companies or agents."

Indeed, Senator O'Mahoney said that the purpose of the bill was to outlaw "regulation by private combinations and groups." 91 Cong. Rec. 1483, col. 3 (1945). He stated in the strongest possible terms Congress' hostility to pri-

vate lawmaking by insurance companies. *Id.* at 1485, col. 2-3. Private regulation is exactly what is alleged here — private regulation of the availability and terms of insurance. It is highly unlikely that Congress intended to prohibit private lawmaking with respect to other insurance companies and agents and yet condone it with respect to policyholders or other traders. The anticompetitive effect is the same in each case: private combinations are making decisions that should only be made individually in a free market or publicly by state regulators. Moreover, policyholders are unorganized and have no bargaining power and are therefore most vulnerable to such practices.

It must not be forgotten that Congress took the words "boycott, coercion, or intimidation" from the *South-Eastern Underwriters* case, and that the conduct thus described in that case included concerted refusals to deal with policyholders. One of the objectives of the conspiracy in *South-Eastern Underwriters* was "to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms," 322 U.S. at 535; and the method used to attain that objective was threatening the policyholders of non-S.E.U.A. companies "with boycotts and withdrawal of all patronage," *id.* at 536.

The boycott exception was clearly intended "to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of 'boycott, coercion, or intimidation' to the prohibitions of the Sherman Act." *Proctor* v. *State Farm Automobile Insurance Co., supra,* 561 F.2d at 273. In the case at bar, as in *South-Eastern Underwriters,* insurance companies have dictated the terms of insurance to policyholders and have used collective refusal to deal as a tool to attain their objective. Surely Congress intended these activities to fall within the boycott exception, since such activities are "explicitly addressed in the case from which its language is drawn." *Id.* at 274.

Finally, any interpretation of the boycott exception must take account of the fact, frequently noted in the debates, that the Act was compromise legislation. *E.g.,* 91 Cong. Rec. 479, col. 1 (1945) (remarks of Senator Ferguson); *id.* at 1085-86 (remarks of Representative Walter). It was a compromise between "the position taken by the Senator from Florida [Pepper] and the position taken by . . . the proponents of the Bailey bill," *id.* at 1481, col. 1 (remarks of Senator Murdock)—that is, between those who wanted no antitrust exemption at all for the insurance industry and those who wanted that industry to have complete immunity from all federal regulation, particularly including the antitrust laws. A proposal for complete immunity had, of course, been defeated during the previous session of Congress. *Id.* at 1477, col. 3 (remarks of Senator Pepper); *id.* at 1487, col. 3 (remarks of Senator Barkley).

If we ignore the boycott exception for the moment, the proponents of complete immunity achieved the following through the enactment of McCarran-Ferguson: (1) state regulation and taxation are insulated from constitutional challenges under the commerce clause as undue burdens on interstate commerce; (2) state regulation and taxation are valid as against any federal law that does not specifically relate to the business of insurance; and (3) state regulation completely preempts the Sherman, Clayton, Federal Trade Commission and Robinson-Patman Acts.

The boycott exception only applies a portion of the Sherman Act to the insurance industry; it does not affect the industry's immunity from other federal regulation. If it is given the artifically narrow reading proposed by petitioners, then the proponents of full antitrust liability received almost nothing in exchange for their support. Yet the overwhelming vote in favor of the bill in both houses,

see id. at 1093-94, 1396, 1488-89, suggests that those persons were for the most part satisfied with the compromise. It is hard to believe "that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel." *Barry* v. *St. Paul Fire & Marine Insurance Co.*, 555 F.2d at 12 (A.67). We submit that Senator O'Mahoney, who began as a skeptic and ended by supporting the bill, expressed the clear intent of Congress when he said that the boycott exception would prohibit "*every* effective combination or agreement to carry out a program against the public interest." 91 Cong. Rec. 1486, col. 2 (1945).

Moreover, one of the chief parties to this compromise was the insurance industry itself, which was heavily involved in drafting the bill and which gave its approval thereto. *See* "Conclusion," S. Rep. No. 20, 79th Cong., 1st Sess. (1945); "Conclusion," H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 479, col. 1 (remarks of Senator Ferguson); *id.* at 1086, col. 1 (remarks of Representative Walter). The insurance companies obviously sought the greatest possible freedom from federal regulation. If they could have achieved an express limitation on the scope of the boycott exception, they surely would have done so — by the simple expedient of adding the words "of other insurance companies or agents" after the word "intimidation" in §3(b). Certainly, it cannot be assumed that these experienced draftsmen and lobbyists would have left such an important limitation unspoken.

Without §3(b), the Act is practically the same as the grant of total immunity that Congress had rejected just one year earlier. In proposing their exceedingly narrow and highly artificial interpretation of §3(b), petitioners are in effect asking this Court to give them by way of construction what the industry was unable to get from Congress. We respectfully urge the Court to decline that invitation.

The First Circuit was clearly correct when it concluded that the legislative history contains no "evidence that would justify . . . reading the boycott provision in the special way urged by [petitioners]." 555 F.2d at 12 (A. 68).

C. *A narrow reading of section 3(b) would be inconsistent with this Court's interpretation of the section 2(b) antitrust exemption.*

There is an obvious relationship between the scope of the boycott exception on the one hand and the scope of the antitrust exemption on the other since between them they cover the field. This Court has consistently given the § 2(b) exemption from federal regulation a narrow scope—even in the face of dissenting opinions arguing, as petitioners do here, that the purpose of the McCarran-Ferguson Act was broadly to withdraw the federal government from the field of insurance regulation.

In *SEC* v. *Variable Annuity Life Insurance Co. of America*, 359 U.S. 65 (1959), the Court held that variable annuity contracts are not insurance contracts and therefore are subject to SEC regulation. Justice Harlan, dissenting, argued that the policy of the McCarran-Ferguson Act was to "[leave] regulation of the business of insurance entirely to the States," *id.* at 96, *see also id.* at 99, and that the holding of the majority was contrary to that policy.

The following year the Court decided *FTC* v. *Travelers Health Association*, 362 U.S. 293 (1960), in which the FTC sought to regulate the activities of a Nebraska corporation that sold mail-order insurance throughout the United States. A Nebraska statute prohibited deceptive practices carried out either in Nebraska or in any other state by insurance companies domiciled in Nebraska. The Court held that Congress intended the Federal Trade Commission Act to be preempted only by regulation by the state in which the deception is practiced and in which it has its

impact. *Id.* at 298-99. Consequently, Nebraska's attempt to regulate the out-of-state mailings of its domiciliary did not deprive the FTC of jurisdiction. Justice Harlan again dissented, arguing that McCarran-Ferguson "pervasively restored to the States the regulation of the business of insurance," *id.* at 303, and that the majority's narrow interpretation of the concept of state regulation was inconsistent with the policy of the Act.

Most recently, in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), the Court held unanimously that a state law designed to protect insurance company stockholders was not a law regulating "the business of insurance" within the meaning of the Act and therefore was not preemptive of the federal securities laws. The Court rejected the argument that all the activities of insurance companies constitute "the business of insurance"; instead, it interpreted the statutory phrase narrowly, holding that it referred solely to the contract of insurance itself and to the insurer-policyholder relationship based upon that contract. *Id.* at 459-60; *see* Comment, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 Duke L.J. 1340, 1345-48.

Thus, the Court has given narrow scope to every aspect of § 2(b) and correspondingly broad scope to permissible federal regulation of insurance companies.

Section 2(b) marks out the area within which the states may, if they choose, preempt federal regulation. In other words, to the extent that the policy of the Act is to withdraw the Federal Government from the field of insurance regulation, that policy is centrally expressed in § 2(b). Yet this Court, as we have shown, has not found that the field that Congress intended to leave to paramount state regulation is very broad.

By contrast, § 3(b)—the boycott exception—marks out the area within which the states *cannot* legislate. Thus, to the extent that the policy of the Act is that the core of

the Sherman Act shall retain primacy in the area of insurance, that policy is centrally expressed in § 3(b). Consequently, in view of the broad scope this Court has given to federal concerns under § 2(b), it would be quite incongruous to give narrow scope to those same concerns under § 3(b), which makes those concerns paramount.

III. The Boycott Exception Subjects Even the Core of the Business of Insurance to Sherman Act Regulation.

In effect, petitioners argue that the boycott exception must be construed so that "the business of insurance" as defined in *SEC* v. *National Securities, Inc., supra,*—*i.e.*, the insurer's relationship with its policyholders—is absolutely immune from antitrust liability. They take the position that Congress intended to leave the protection of policyholders entirely to the states. The trouble with this argument is that the boycott exception is precisely that—an *exception* to the immunity granted in § 2(b). The boycott exception says that "[*n*]*othing* contained in this chapter —and that includes § 2(b)—shall preclude the application of the Sherman Act to agreements or acts of boycott, coercion, or intimidation. Numerous statements in the legislative history explicitly show that the states, even in the course of exercising their right to regulate "the business of insurance," cannot authorize boycott, coercion, or intimidation. *See* Point II, *supra*. Thus, no aspect of the business of insurance is immune from antitrust liability with respect to the proscribed practices.

The point was made in *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 179 F. Supp. 65 (N.D. Cal. 1959), in which the plaintiff insurance agents alleged a conspiracy to fix commission rates and a boycott of agents who refused to accede to the fixed

rates. The fixing of commission rates was regulated by the state. Nevertheless, the court held that the boycott exception "permits a Sherman Act suit in a state regulated phase of the insurance industry if conduct amounts to boycott, coercion or intimidation. These are the methods to effectuate the refusal to deal except at the agreed price." *Id.* at 66; *see* Minnesota Note, 46 Minn. L. Rev. at 1104-05.

The same conclusion was reached by the District of Columbia Circuit in the recent case of *Proctor* v. *State Farm Mutual Automobile Insurance Co., supra.* The complaint in *Proctor* alleged that the defendant insurance companies had conspired to fix the prices they would pay for repairs to insured automobiles and had entered into a group boycott of repair shops that would not agree to accept the prevailing rates as payment in full. The court held that the price-fixing agreement fell within the core of "the business of insurance" as defined in *National Securities.* 561 F.2d at 267-70. Nevertheless, the court concluded that the alleged boycott of repair shops fell within the boycott exception. *Id.* at 275.

Thus, even if there were a conflict between state regulations and the Sherman Act in matters falling within the scope of the boycott exception, the Sherman Act would control. In fact, however, as we show in Point IV, the issue of state-federal conflict raised by petitioners and *amici* in this case is a spurious issue, because, *inter alia,* no state-approved conduct is challenged in this case.

IV. There Is No Conflict Between State Regulation of Insurance Rates and Terms and Federal Control of Boycott, Coercion and Intimidation.

There is nothing novel about the idea that state regulation of an industry or profession should coexist with federal regulation under the antitrust laws. Contrary to the

suggestion of the National Association of Insurance Commissioners (NAIC) in its *amicus curiae* brief (NAIC Br. at 19), the antitrust laws are an adjunct to state regulation, not an alternative. *Cf. Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792-93 (1975). For example, the State of Rhode Island regulates almost fifty businesses and professions, ranging from architects to wrecking contractors. R.I. Gen. Laws 1956 (1976 Reenactment) Title 5 (see Appendix A). Yet all of these businesses and professions are subject to the antitrust laws; and there is no suggestion that there is any conflict, in the ordinary course of affairs. "Regulated industries are not *per se* exempt from the Sherman Act." *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439, 456 (1945).

The fixing of rates is at the heart of the state-regulated "business of insurance," as the *National Securities* case held. Yet this Court has recognized that there is no conflict between a scheme of administered price regulation and antitrust liability for illegal price-fixing schemes. In *Georgia* v. *Pennsylvania R.R., supra,* the complaint alleged an illegal price-fixing conspiracy enforced by coercion. *Id.* at 443-45. The defendants argued that the Interstate Commerce Act required them to agree upon joint through rates. "That is true," said the Court:

> "But it would be a perversion of those sections to hold that they legalize a rate-fixing combination of the character alleged to exist here.
>
> • • •
>
> "[W]e find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. . . . [By this con-

spiracy a] monopoly power is created under the aegis of private parties without Congressional sanction and without governmental supervision or control." *Id.* at 457, 458-59.

Similarly, if the boycott exception does not cover the alleged conduct of petitioners in this case, then private parties are permitted to control the market without congressional sanction and without state supervision or control.

The Court in the *Pennsylvania R.R.* case went on to explain why there was no conflict between ICC control over ratemaking and the imposition of antitrust liability upon the defendants for their private rate-fixing conspiracy:

> "*The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through rates. It seeks to put an end to discriminatory and coercive practices.* The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. *That is not to undercut or impair the primary jurisdiction of the Commission over rates.* It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted." *Id.* at 459-60 (emphasis added).

Similarly, the present suit seeks to remove the influence of a private conspiracy over the availability, terms and

conditions of medical malpractice insurance in Rhode Island. As we have shown, the legislative history is clear that the states have no authority with respect to boycott, coercion, or intimidation; those are matters for exclusive federal control. To attack the alleged conspiracy, therefore, is not to interfere with Rhode Island's jurisdiction over rates and terms of insurance.

In the *National Securities* case, the SEC sought, as a remedy for Rule 10b-5 violations, to unwind an insurance company merger that had been approved by the Arizona Director of Insurance. Since state law required the director to find that the merger would not "substantially reduce the security of and service to be rendered to policyholders," the Court found that his approval clearly related to "the business of insurance." 393 U.S. at 462. The Court nevertheless found that there was no state-federal conflict, because, *inter alia,* "Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so." *Id.* at 463. In the case at bar, the state has not even permitted respondents to undertake the agreements and activities alleged in the complaint; it has had nothing whatever to do with those agreements and acts. The alleged conduct of respondents took place entirely outside the structure of state regulation and without state approval or permission. Thus, respondents do not seek to apply the Sherman Act in a way that would defeat the policy of the state. *Cf. United States* v. *Frankfort Distilleries, Inc., supra,* 324 U.S. at 299.

The petitioners claim that the relief sought here would interfere in some way with state policy as expressed in the creation of the Joint Underwriting Association (JUA). (Pet. Br. at 37-38).[9] This suit does not seek to enjoin any-

[9] The petitioners also contend that there is no need for federal control of the alleged anticompetitive conduct because the state

thing done by the JUA; it seeks to enjoin an agreement made by petitioners before the JUA was established. It is true that the JUA is authorized to issue both claims made and occurrence basis policies; but that does not mean that the members of the JUA can agree privately not to issue occurrence basis policies. An injunction against that agreement does not interfere with the operation of the JUA or with any state policy.

The fundamental relief sought in this suit is that petitioners be enjoined from boycotting, coercing and intimidating respondent physicians into accepting insurance policies on unreasonable terms, and that petitioners pay damages for having engaged in such conduct. This clearly does not conflict with any state goal, policy or regulatory activity. The respondents are confident that the district court can accommodate the details of any relief granted to the needs of the state's regulatory program; the federal courts have considerable experience in making such accommodations, and the district court has broad power to tailor relief as a court of equity.

V. The First Circuit's Interpretation of Section 3(b) Will Not Subject Insurance Companies to Antitrust Liability for Legitimate, State-authorized Activities.

The central argument presented in the *amicus curiae* briefs of the NAIC and the American Insurance Association, *et al.* (AIA) is that reading § 3(b) to protect policy-

has "dealt with" the problem by establishing the JUA. (Pet. Br. at 36-37). This seems to amount to a contention that the creation of the JUA makes this case moot. That is contrary to the position taken by petitioners before the First Circuit, where all parties agreed that the establishment of the JUA did not moot the case. Furthermore, respondents allege that petitioners' fraudulent acts, misrepresentations and anticompetitive activities created the purported "medical malpractice insurance crisis" that led to the formation of the JUA. (A. 35-36.) Thus, the JUA is a symptom of the problem, not a cure.

holders will subject insurance companies to wide-open antitrust liability for legitimate, state-regulated activities.

The NAIC complains that application of the boycott exception to protect policyholders will interfere with state regulation of insurance rates, policy forms, solvency and availability. (NAIC Br. at 9-10). With respect to rates and forms, the NAIC, like petitioners, depends upon the argument that any antitrust conspiracy can be pleaded as a boycott—*e.g.*, a price-fixing agreement is a concerted refusal to deal except at fixed rates; a conspiracy to fix terms is a concerted refusal to deal except on the terms stated.

The respondents submit that petitioners and *amici* have grossly exaggerated this "creative pleading" problem. The courts are quite capable of distinguishing between boycotts and other antitrust conspiracies on a case-by-case basis. *See Proctor* v. *State Farm Mutual Automobile Insurance Co., supra,* 561 F.2d at 274 & n.21.

In view of Congress' broad purpose to deprive private anticompetitive agreements of their efficacy by means of § 3(b) (*see* Point II, *supra*), it may well be that at least some cases of refusal to deal "except on specified terms" should be treated as boycotts. *See California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co., supra;* Minnesota Note, 46 Minn. L. Rev. at 1105 n.93. *See also* Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531, (1958). That issue is not presented by this case, however. The complaint in this case alleges that three of petitioners engaged in a concerted refusal to sell respondent physicians *any* malpractice insurance on *any* terms. That is a traditional boycott—*i.e.*, a complete refusal to deal under terms.

With respect to state regulation of insurer solvency, the NAIC's argument ignores the fact that it takes concerted action to make a boycott. This Court established long ago that unilateral refusals to deal do not violate the antitrust

laws. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). Thus, it is not a boycott if "an insurer, under its own volition or pursuant to an insurance commissioner's suggestion, reduce[s] its book of business" in order to maintain its solvency. (NAIC Br. at 23.) Nor is it even remotely possible that an insurance commissioner's disapproval of a rate filing or reimposition of rate filing requirements (NAIC Br. at 26) could be construed as a boycott. *Parker* v. *Brown*, 317 U.S. 341 (1943).[10]

The NAIC is joined by the AIA in its fourth point—that state-regulated insurance pools and other joint marketing mechanisms will be vulnerable to antitrust attacks under the First Circuit's interpretation of the boycott exception.[11] At the outset, it should be noted that, as *amici* themselves vigorously assert, the purpose of such mechanisms is to provide insurance, not to deny it. (AIA Br. at 4-16; NAIC Br. at 13-16.) It is fair to assume that refusal of coverage

[10] Petitioners and *amici* make much of the supposed insufficiency of *Parker* v. *Brown*, to shield legitimate state regulatory activity from antitrust liability. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Obviously, the McCarran-Ferguson Act shields from antitrust liability some state-authorized activities, such as the use of rating bureaus, that probably would not be protected under *Cantor*. When an insurer engages in boycott, coercion, or intimidation, however, there is no reason why it should have greater protection from Sherman Act liability than *Parker* provides to other state-regulated industries in similar circumstances.

[11] Respondents vigorously protest the AIA's recital of the alleged genesis of the so-called "medical malpractice insurance crisis" that led to the establishment of the JUAs. (AIA Br. at 6-9.) To give such a one-sided view of a controversial issue that is completely irrelevant to the case at bar oversteps the function of an *amicus* brief. There is nothing in the record before this Court to support the AIA's argument, which relies largely on the industry's own study. (AIA Br. at 7-9 nn.3-6). In respondents' view, the "crisis" was contrived by the insurance companies themselves, for the purpose of driving up rates and for other purposes (*see* note 14, *infra*); and respondents could, if it were relevant, provide ample documentation to support their view. The respondents submit that the AIA's discussion of this issue is unfair, misleading and an imposition on this Court.

under these mechanisms is a rare event. Consequently, the argument of *amici* that the continued existence of such pools will be endangered if policyholders are protected by the boycott exception seems unwarranted.[12]

Assuming arguendo, however, that coverage will sometimes be denied by such mechanisms, the AIA voices the fear that such refusals will be deemed per se violations of the Sherman Act. (AIA Br. at 16-20.) It is true that this Court has held certain boycotts to be per se antitrust violations. *E.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). A number of court of appeals, however, have declined to apply the per se rule to all boycotts. *E.g., Mackey* v. *NFL*, 543 F.2d 606, 618-22 (8th Cir. 1976) ("Rozelle Rule" is a boycott, but is subject to rule of reason analysis); *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178, 185-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 75-80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

The problem of the application of the per se rule to boycotts has been the subject of extensive discussion. *E.g.*, McCormick, *Group Boycotts: Per Se or Not Per Se—That is the Question*, 7 Seton Hall L. Rev. 703 (1976); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773 (1974); Comment, *A Re-Examination of the Boycott Per Se Rule in Antitrust Law*, 48 Temple L.Q. 126 (1974). Most commentators appear to agree that it is unreasonable to make all boycotts per se violations. *See Ruddy Brook Clothes, Inc.* v. *British & Foreign Marine Insurance Co.*, 195 F.2d 86, 89 (7th Cir. 1952).

[12] The AIA's and petitioners' solicitude for the JUAs is somewhat puzzling, since the insurance industry strenuously opposed the establishment of the JUAs as an unwarranted interference with the free market.

In an influential article, Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847 (1955), the author distinguishes between concerted refusals to deal intended to coerce the conduct of the third parties or to secure their removal from competition, which he says should be treated as per se violations, and concerted refusals involving acceptance of limitations on individual freedom to deal but not intended to coerce or eliminate the competition of third parties, which he says should be analyzed under the rule of reason. He emphasizes, however, that "*all* . . . situations [that] involve an agreement between two or more persons under which one or more of them agree not to deal with third persons *and for that reason foreclose a part of the market to such third persons* . . . are . . . subject to scrutiny under the antitrust laws." *Id.* at 877 (emphasis added). Thus, since the agreement alleged in this case coerced respondent physicians and closed a substantial portion of the malpractice insurance market to them, that agreement must be subjected to scrutiny under the antitrust laws. It may well be a *per se* violation; but that is not at issue at this stage of the case.

The First Circuit recognized that the proper approach is judicious application of the *per se* rule, not an artificially narrow definition of the word "boycott." 555 F.2d at 7-8 n.4 (A. 57-58 n.4). *See also* Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest*, 27 Rutgers L. Rev. 140, 144-49 (1973).

We submit that this approach will meet the concerns raised by *amici*. If a pool or other joint insurance mechanism denies coverage for legitimate insurance reasons, then under the rule of reason there is clearly no violation, since there is neither anticompetitive motive nor anticompetitive effect. Nor is there any reason to assume that the JUAs or other joint mechanisms will engage in coercive

or predatory activities. If they do, however, there is no reason why they should be immune from liability under § 3(b), which was enacted to prohibit such activities.

Similarly, refusal of coverage on the basis of uniform risk classifications (AIA Br. at 20-23) will be readily justifiable under the rule of reason, unless insurers engage in concerted manipulation of the classification process.

It is important to recognize, however, that the issues raised by *amici*—denial of coverage by an insurance pool, or by individual insurers based on uniform risk classifications—are not presented in this case. In this case, four insurers allegedly entered into a private conspiracy whereby three of them agreed not to sell insurance to the customers of the fourth. It is noteworthy that none of those urging reversal is trying to justify this conduct or to argue that it is not a proper subject of antitrust liability. Their argument, rather, is that to permit this suit to proceed will improperly subject other activities to antitrust liability. This attempt to use the legitimate activities of authorized joint entities to shield the illegitimate activities of a private combination should be rejected.

The respondents submit that antitrust doctrine is sufficiently flexible to protect legitimate, authorized joint activities. The wholly unjustified (and unjustifiable) conduct alleged in this case should not be immunized from the operation of the Sherman Act, contrary to the intent of Congress, merely to avoid the fanciful problems raised by *amici*.

VI. Full Application of Section 3(b) to the Insurance Industry Is Urgently Needed to Fulfill the Intent of Congress, to Check Insurance Company Abuses and to Carry Out the Historic Consumer Protection Function of the Sherman Act.

In *South-Eastern Underwriters*, this Court reversed a 75-year-old precedent in holding that the business of insur-

ance is commerce and therefore is subject to the antitrust laws. During the McCarran-Ferguson Act debates, Senator Pepper referred to that case as "eminently correct, and . . . an example of justice too long delayed." 91 Cong. Rec. 1443 (1945). The respondents respectfully submit that a similar situation confronts the Court today. Justice for policyholders under § 3(b) has been too long delayed. There is an important difference, however, between the two situations: this case, unlike *South-Eastern Underwriters,* does not require the reversal of any precedent. This Court has never construed the boycott exception. We respectfully submit, therefore, that Judge Campbell, dissenting below, erred when he said that the First Circuit majority had "reinterpret[ed] the McCarran-Ferguson Act thirty years after enactment." 555 F.2d at 15 (A. 75). There is no question of reinterpretation here. The respondents are only asking this Court to enforce the clear intent of Congress that all victims of insurance company boycott, coercion, or intimidation, not just other insurance companies and agents, be provided with the protection of the Sherman Act through § 3(b).

The petitioners say that the decision below will "thrust" a consumer protection function upon the federal courts (Pet. Br. at 41), as if that were an improper function for federal courts under the antitrust laws. In fact, consumer protection is one of the historic functions of the Sherman Act. See Point I, *supra.* In light of this historic purpose, it would be odd indeed to hold that Congress intended to foreclose the protection of the boycott provision to consumers.

Moreover, the word "consumer" has special significance in the field of insurance. "Consumers" are usually thought of as opposed to "business"—ultimate purchasers, that is, as opposed to purchasers for resale. But everyone who buys insurance is an ultimate purchaser. The policyholders

who seek the protection of the boycott exception are not just individuals purchasing automobile insurance or home fire insurance; they include businesses of every description. Business cannot operate without insurance. The insurance industry never tires of reminding us that the wheels of commerce would grind to a halt without insurance. The respondents agree that this is so and submit that it provides compelling support for the view that Congress did not intend to leave the protection of policyholders from predatory insurance practices to the states.

The form of regulation enacted by the states in response to the McCarran-Ferguson Act is not calculated to protect policyholders from insurance company conspiracies directed against them. All fifty states have enacted Fair Trade Practices applicable to the insurance business. AIA Br. at 16 n.15; Minnesota Note, 46 Minn. L. Rev. at 1093. These acts provide no consumer remedy for unfair trade practices. The Rhode Island law is typical. Many of the practices it proscribes can be directed against policyholders. R.I. Gen. Laws 1956 (1968 Reenactment) § 27-29-4. But the law gives policyholders no right to initiate either administrative or judicial proceedings to protect their rights. Only the insurance commissioner can take action against an insurer. *Id.* §§ 27-29-5, 27-29-8. If he takes no action, policyholders are remediless under the state law. Thus, the consumer remedies of the Sherman Act supplement, rather than replace, the state regulations.

Despite the foregoing, petitioners and *amici* argue that Congress intended to leave the protection of policyholders entirely to the states. In fact, Congress clearly feared that state regulation of antitrust violations—as opposed to state regulation of rates and policy terms—would be inadequate.[13]

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[13] It should be noted that the maximum penalty against a Rhode Island insurer for willfully violating a cease and desist order is $500. R.I. Gen. Laws 1956 (1968 Reenactment) § 27-29-9.

See 91 Cong. Rec. 1444 (1945) (colloquy among Senators Pepper, O'Mahoney, McCarran, White, Murdock and Barkley). That fear, we submit, has been realized. Insurance is a vast interstate industry with a stranglehold on the commerce of the nation. By threatening to pull out of a market if their demands are not met, insurance companies can exercise substantial control over state regulators.[14] The federal courts are free of such influences. That is why Congress intended to leave federal regulation paramount with respect to boycott, coercion and intimidation.

Furthermore, at least some state insurance regulators apparently have more sympathy for the insurance companies than for the public on whose behalf they are supposed to regulate. This case presents the spectacle of the National Association of Insurance Commissioners seeking to shield the activities of insurance companies from the Sherman Act —even the predatory activities that Congress clearly wished to outlaw through § 3(b).[15]

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[14] State legislatures are also subject to insurance company coercion. A perfect example of this is the "medical malpractice insurance crisis." Under insurance company pressure, many states, including Rhode Island, have enacted legislation, the constitutionality of which has not yet been tested, severely curtailing both common law and constitutional rights of the public in medical malpractice cases (*e.g.*, limitations on damages, denial of equal access to the courts, substantial denial of right to trial by jury, application of statutes of limitations to infants and abrogation of doctrines of liability).

[15] The most disturbing thing about the NAIC brief, however, is the implication it carries with it that it represents the views of all fifty insurance commissioners, or at least of a majority of them, and perhaps even of the fifty states. In fact, when respondents' permission for the filing of the NAIC brief was sought, counsel for the NAIC informed respondents' counsel that the decision to file the brief had been made by two commissioners: Lester Rawls of Oregon, president of the NAIC, and Harold McGuffy of Kentucky, chairman of the executive committee of the NAIC. Mr. Rawls subsequently resigned under fire from his post as Oregon Insurance Commissioner. *Wall Street Journal*, Nov. 29, 1977, p. 34. The NAIC as a group never voted either on the decision to appear as *amicus* or on the brief; no meeting of the executive committee, the board, or the membership was ever held with respect to this matter. Nor, to respondents' knowledge, was any action, legislative, administrative, or otherwise, taken by any state to approve this brief.

Section 3(b) specifically applies the Sherman Act to the business of insurance. What petitioners seek can only be described as an implied exemption—and implied exemptions from the antitrust laws are not favored. *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 787. To artificially narrow the boycott exception, in a manner supported neither by its language nor by its history, would be to abrogate a promise made by the Congress when it enacted 3(b)—namely, that insurance companies would find no shield in the McCarran-Ferguson Act for predatory anticompetitive activities, against whomever directed.

Conclusion

In his dissenting opinion in this case, Judge Campbell stated that one reason for his disagreement with the majority opinion was that it "introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit." 555 F.2d at 15 (A. 75). With all respect, respondents submit that this consideration is irrelevant to the decision of this case. It is the responsibility of the courts to deal with suits on their merits, whether there be few suits or many. *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410-11 (1971) (Harlan, J., concurring). Courts were established to provide legal redress, and "the existence of a multitude of claims merely shows society's pressing need for [such] redress." *Dillon* v. *Legg*, 68 Cal. 2d 728, 735 n.3, 441 P.2d 912, 917 n.3, 69 Cal.

Rptr. 72, 77 n.3 (1968). Under §3(b), respondents are clearly entitled to redress in federal court for the injuries alleged here.

For the reasons set forth herein, the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

General Laws of Rhode Island, 1956 (1976 Reenactment)

TITLE 5
BUSINESSES AND PROFESSIONS

CHAPTER

1. ARCHITECTS, §§ 5-1-1 to 5-1-29.
2. BOWLING ALLEYS, BILLIARD TABLES, AND SHOOTING GALLERIES, §§ 5-2-1 to 5-2-14.
3. CERTIFIED PUBLIC ACCONTANTS, §§ 5-3-1 to 5-3-18.
4. COAL AND COKE DEALERS, §§ 5-4-1 to 5-4-23.
5. DETECTIVES, §§ 5-5-1 to 5-5-4.
6. ELECTRICIANS, §§ 5-6-1 to 5-6-30.
7. EMPLOYMENT AGENCIES, §§ 5-7-1, 5-7-2.
8. ENGINEERS AND LAND SURVEYORS, §§ 5-8-1 to 5-8-22.
8.1. [REPEALED.]
9. [REAPEALED.]
10. HAIRDRESSERS, COSMETICIANS AND MANICURISTS, §§ 5-10-1 to 5-10-35.
11. HAWKERS AND PEDDLERS, §§ 5-11-1 to 5-11-18.
12. HIDE AND LEATHER INSPECTION, §§ 5-12-1 to 5-12-4.
13. HORSE RIDING SCHOOLS, §§ 5-13-1 to 5-13-9.
14. HOTELS, §§ 5-14-1, 5-14-2.
15. ITINERANT VENDORS, §§ 5-15-1 to 5-15-16.
16. LAUNDRIES, §§ 5-16-1 to 5-16-7.
17. MOVERS, §§ 5-17-1 to 5-17-4.
18. OUTDOOR ADVERTISING, §§ 5-18-1 to 5-18-4.
19. PHARMACY, §§ 5-19-1 to 5-19-37.
20. PLUMBERS, §§ 5-20-1 to 5-20-36.
20.5. REAL ESTATE BROKERS AND SALESMEN, §§ 5-20.5-1 to 5-20.5-22.
21. SECOND-HAND DEALERS, §§ 5-21-1 to 5-21-7.
22. SHOWS AND EXHIBITIONS, §§ 5-22-1 to 5-22-25.
23. SUNDAY BUSINESS, §§ 5-23-1 to 5-23-5.

CHAPTER

24. Taverns, Cookshops, and Oyster Houses, §§ 5-24-1 to 5-24-5.
25. Veterinarians, §§ 5-25-1 to 5-25-17.
26. Division of Professional Regulation, §§ 5-26-1 to 5-26-5.
27. Barbers, §§ 5-27-1 to 5-27-34.
28. [Repealed.]
29. Chiropodists, §§ 5-29-1 to 5-29-18.
30. Chiropractors, §§ 5-30-1 to 5-30-17.
31. Dentists and Dental Hygienists, §§ 5-31-1 to 5-31-21.
32. Electrolysis, §§ 5-32-1 to 5-32-17.
33. Embalmers and Funeral Directors, §§ 5-33-1 to 5-33-26.
34. Nurses, §§ 5-34-1 to 5-34-38.
35. Optometrists and Opticians, §§ 5-35-1 to 5-35-31.
36. Osteopaths, §§ 5-36-1 to 5-36-10.
37. Physicians and Surgeons, §§ 5-37-1 to 5-37-21.
38. Automobile Body Repair Shops, §§ 5-38-1 to 5-38-24.
39. Social Workers, §§ 5-39-1 to 5-39-25.
40. Physical Therapists, §§ 5-40-1 to 5-40-25.
41. Imported Goods, §§ 5-41-1 to 5-41-3.
42. Debt Pooling, §§ 5-42-1, 5-42-2.
43. Instruction in Jiu-jitsu or Karate, §§ 5-43-1, 5-43-2.
44. Psychologists, §§ 5-44-1 to 5-44-25.
45. Nursing Home Administrators, §§ 5-41-1 to 5-45-13.
46. Automobile Clubs, § 5-46-1.
47. Wrecking Contractors, §§ 5-47-1, 5-47-2.
48. Speech Pathology and Audiology, §§ 5-48-1 to 5-48-15.
49. Hearing Aid Dealers and Fitters, §§ 5-49-1 to 5-49-20.
50. Health Clubs, §§ 5-50-1 to 5-50-6.
51. Rhode Island State Board of Examiners of Landscape Architects, §§ 5-51-1 to 5-51-14.